No. 138. ORIGINAL

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Exceptions to the First Interim Report of the Special Master

BRIEF OF THE STATE OF NORTH CAROLINA IN OPPOSITION TO PLAINTIFF'S EXCEPTIONS

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QUESTION PRESENTED

Whether the Special Master correctly concluded that the advantages of allowing the motions to intervene outweighed any potential disadvantage and that the limited participation of these intervenors is consistent with this Court's precedent.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. THE COURT SHOULD REJECT SOUTH CAROLINA'S INVITATION TO ADOPT A BLANKET RULE THAT ONLY THE UNITED STATES, INDIAN TRIBES AND STATES MAY INTERVENE IN WATER RIGHTS CASES 8

II. SOUTH CAROLINA'S CONCERN OVER THE POSSIBILITY OF WIDE-SCALE INTERVENTION IS MISPLACED. 13

III. THE UNITED STATES ERRS IN ASSERTING THAT THE PRESENCE OF INTERVENORS WOULD MAKE SETTLEMENT MORE DIFFICULT 15

IV. EACH OF THE THREE INTERVENORS HAS SUFFICIENT INTEREST TO JUSTIFY ITS PARTICIPATION IN THIS ACTION 18

V. THE PRESENCE OF THE INTERVENORS WILL NOT PREJUDICE THE PARTIES ... 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Arizona v. California, 373 U.S. 546 (1963) 9

Arizona v. California, 460 U.S. 605 (1983) 9

College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 16

Colorado v. Kansas, 320 U.S. 383 (1943) 16

Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983) 9, 10

Kentucky v. Indiana, 281 U.S. 163 (1930) 9

Lincoln Prop. Co. v. Roche, 546 U.S. 81 (2005) 11

Maryland v. Louisiana, 451 U.S. 725 (1981) 6, 9

Nebraska v. Wyoming, 515 U.S. 1 (1995) 11

New Jersey v. New York, 345 U.S. 369 (1953) 7, 10, 11, 22, 23

CONSTITUTIONS AND STATUTES

U.S. CONST. ART. I, § 10, cl. 3 16

N.C. Gen. Stat. § 143-215.22L (2009) 1

MISCELLANEOUS

16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 107.14(2)(c)(v) (3d ed. 2006) 11

STATEMENT

1. Under North Carolina law, any transfer of water from one river basin to another in excess of two million gallons per day must first be approved by the North Carolina Environmental Management Commission ("NC EMC"). N.C. Gen. Stat. § 143-215.22L (2009). On December 19, 2006, the South Carolina Attorney General wrote to the North Carolina Attorney General threatening to bring an original action in the event that the NC EMC were to approve a specific interbasin transfer ("IBT") relating to the Catawba River that was pending before the NC EMC. S.C. Br. in Support of Motion for Leave to File Bill of Compl., Ex. 2. After reviewing the impacts of the proposed IBT, as well as South Carolina's comments and concerns, the NC EMC reduced the size of the proposed IBT to a small fraction of the original request. With this substantial reduction, the IBT permit was approved by the NC EMC in January 2007. Despite the NC EMC's efforts to respond to South Carolina's concerns, South Carolina proceeded to file its Motion for Leave to File a Bill of Complaint.

As foreshadowed by the demand letter of the South Carolina Attorney General, South Carolina's Bill of Complaint in this action is focused on IBTs from the Catawba River. In its Bill of Complaint, South Carolina alleges:

> 3. In 1991, North Carolina enacted an "interbasin transfer statute" that purports to authorize the transfer of large volumes of water

> from one river basin in North Carolina to another basin in that State. Under that statute, North Carolina has authorized the transfer of at least 48 million gallons per day from the Catawba River Basin, with the most recent such transfer authorized in January 2007.
>
> 4. These past transfers – and threatened pending transfers – exceed North Carolina's equitable share of the Catawba River. . . .

Bill of Compl. ¶¶ 3, 4; *see also* S.C. Br. in Supp. of Mot. for Leave to File Bill of Compl., p. 9 ("The North Carolina interbasin statute, and the transfers from the Catawba River authorized under that statute, are directly contrary to this Court's decisions with respect to interstate rivers."). The Bill of Complaint expressly singles out three IBT authorizations held by: 1) the City of Charlotte, 2) the Cities of Concord and Kannapolis jointly, and 3) Union County (acting through the Catawba River Water Supply Project ("CRWSP") and pursuant to the statute's grandfather provision). Bill of Compl. ¶¶ 20, 21. Other than the permits held by Charlotte and Concord/Kannapolis, the NC EMC has issued no IBT permits with respect to the Catawba River.

In its prayer for relief, South Carolina requests that North Carolina be enjoined from authorizing the existing IBTs and issuing any future IBT permits. Bill of Compl., Prayer for Relief. South

Carolina made a comparable request in an Application for Preliminary Injunction.

2. Shortly after this Court granted South Carolina leave to file a Bill of Complaint, Duke Energy Carolinas, LLC ("Duke Energy"), CRWSP and the City of Charlotte filed motions for leave to intervene as defendants. This Court referred those motions to the Special Master.

Each of the three intervenors has a substantial and unique interest in this action. Duke Energy owns and operates a series of 11 dams and reservoirs along the Catawba/Wateree River – six in North Carolina, one at the North Carolina/South Carolina border, and four in South Carolina. These reservoirs allow Duke Energy to generate hydroelectric power and supply cooling water for its two nuclear power plants and three coal-fired plants in the Catawba River Basin. Lake Wylie, formed by the seventh dam along the Catawba River, is located on the border between North Carolina and South Carolina. The flow of water from the Catawba River into South Carolina is therefore controlled by Duke Energy.

Duke Energy is currently in the process of seeking a new license for its 11 dams and reservoirs ("Catawba-Wateree Hydro Project"). As part of its relicensing process before the Federal Energy Regulatory Commission ("FERC"), Duke Energy sought to include all stakeholders in an effort to build a consensus concerning the terms of a new license for these dams. The discussions and negotiations between Duke Energy and the stakeholders ultimately led to a Comprehensive

Relicensing Agreement ("CRA") that was signed by Duke Energy and 69 stakeholders in the Summer of 2006 and amended in December 2006. The signatories to the CRA include natural resources agencies of both South Carolina and North Carolina. That agreement sets out minimum rates of water flow into South Carolina from the Duke Energy reservoirs and, among other things, mandates specific conservation measures for all water users during drought conditions. The CRA constitutes a request by its signatories that FERC grant Duke Energy a license, subject to the terms and conditions of the CRA, for the Catawba-Wateree Hydro Project.

CRWSP is a joint venture consisting of a political subdivision of South Carolina (Lancaster County Water and Sewer District) and a political subdivision of North Carolina (Union County). Under North Carolina's IBT statute, Union County has authority to take five million gallons per day from the Catawba River. In the absence of this IBT, CRWSP could not completely serve its customers in both States. As a result, if this Court were to issue an injunction and equitable apportionment decree prohibiting the Union County IBT, the central purpose for the joint venture would fail.

The City of Charlotte transfers more water from the Catawba River than all other North Carolina transfers combined. Moreover, after Duke Energy, it is the largest consumer of water from the Catawba River in either North Carolina or South Carolina. The City of Charlotte is dependent on this IBT to serve the water needs of the City – water that is consumed by both North Carolina residents and the

thousands of South Carolina residents who commute each day to work in the Charlotte area.

3. After this Court's referral of the motions to intervene to the Special Master, the Special Master conducted a hearing in Richmond, Virginia. South Carolina opposed the motions to intervene. North Carolina consented to the motions of Duke Energy and CRWSP. North Carolina took no position with respect to the motion of the City of Charlotte. As North Carolina explained in filings with the Special Master, North Carolina was not in a position to consent to Charlotte's motion to the extent that the motion asserts that North Carolina will not adequately defend Charlotte's IBT permit.

The Special Master concluded that Duke Energy, CRWSP and the City of Charlotte each have a direct and compelling interest in this action and that their presence would facilitate the prompt resolution of this dispute. She accordingly issued an order recommending that they be allowed to intervene, on a limited basis, as defendants. Thereafter, South Carolina moved the Special Master for reconsideration. The Special Master denied South Carolina's motion for reconsideration.

SUMMARY OF ARGUMENT

South Carolina asserts that in an equitable apportionment action only the United States, Indian tribes or other States should be permitted to intervene. This argument is inconsistent with this Court's express recognition that flexibility is the linchpin of equitable apportionment actions.

Additionally, South Carolina's view cannot be squared with this Court's observation that it "is not unusual to permit intervention of private parties in original actions." *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). In determining whether intervention is appropriate in an original action, this Court and its Special Masters should be guided by the practical needs and limitations of the specific case at hand – not inflexible rules as advocated by South Carolina. Here, the Special Master carefully weighed the interests of both party States, the interests of the intervenors, and the practical advantages and disadvantages of their participation in assessing whether the intervenors' presence would assist her in reaching the proper outcome in this case.

South Carolina further asserts that the Special Master's recommendation, if adopted by this Court, would result in widespread intervention in this and other original actions. South Carolina's fear is unfounded. Only four entities are singled out in South Carolina's Bill of Complaint – three of whom have moved to intervene. The Special Master's recommendation is consistent with this Court's precedent and is highly fact-specific. Accordingly, the recommendation, if adopted by this Court, would not provoke a stampede of intervenors in this or other original actions.

The United States asserts that allowing the motions to intervene would impede the possibility of settlement between the party States. Prior to its filing of an amicus brief on February 20, 2009, the United States has had no involvement in this

proceeding. In contrast, the Special Master has conducted numerous hearings and conferences involving the party States and intervenors. Accordingly, she is in a much better position to judge whether the presence of the intervenors would facilitate or hinder settlement negotiations. Moreover, the United States fails to recognize that the traditional method for settling original actions (i.e., entry into a compact) requires approval by the state legislatures, as well as Congress. Excluding the intervenors from the settlement process would hinder, not facilitate, the ability of the party States to obtain legislative enactment of a compact.

The Special Master appropriately concluded that each of the three intervenors has a direct, compelling and concrete interest in participating, in a limited role, in this action. The interests of all three are attacked by South Carolina in the Bill of Complaint. Duke Energy controls the flow of the Catawba River as a result of its operation of the numerous dams and reservoirs along the river. Its motion to intervene is therefore particularly compelling. Similarly, both Charlotte and CRWSP stand as "the authorized agent[s] for the execution of the sovereign policy which threatened injury" to South Carolina. *New Jersey v. New York*, 345 U.S. 369, 375 (1953). Accordingly, the Special Master's recommendation stands solidly on the precedents of this Court.

Finally, the Special Master correctly concluded that neither party State would suffer any prejudice if these parties are allowed to intervene. In fact, South Carolina does not even make a cursory attempt to assert prejudice.

The Special Master engaged in the appropriate weighing of interests in determining whether the presence of these three intervenors would facilitate the prompt resolution of this action. North Carolina respects and supports the Special Master's carefully considered recommendations.

ARGUMENT

PLAINTIFF'S EXCEPTIONS TO THE FIRST INTERIM REPORT SHOULD BE DENIED

Both South Carolina and the United States paint the decision of the Special Master as opening the floodgates of intervention in all equitable apportionment actions. It will not. Rather, her determination stands as a realistic and practical observation, based on the unique circumstances of this specific case, that granting the intervenors a limited role in this action will facilitate the proper resolution of this dispute. The Special Master's recommendation is entirely consistent with this Court's precedent.

I. THE COURT SHOULD REJECT SOUTH CAROLINA'S INVITATION TO ADOPT A BLANKET RULE THAT ONLY THE UNITED STATES, INDIAN TRIBES AND STATES MAY INTERVENE IN WATER RIGHTS CASES.

While chastising the Special Master for adopting a "one-size-fits-all" rule, South Carolina and the United States advocate a blanket rule that would allow only the United States, Indian tribes

and States to intervene in water rights cases. *See* S.C. Br., p. 21 (arguing that the Court should not permit "non-sovereign water users in an action to apportion equitably an interstate river between States"); U.S. Br., p. 7 ("The Special Master sought to formulate a one-size-fits-all rule to govern non-state parties' participation in original actions in this Court . . . ."). The blanket rule proposed by South Carolina should be rejected by this Court.

Each original action is unique. As reflected by this Court's precedent, the unique factors of each case can and should be considered in determining whether intervention is appropriate. *See, e.g., Arizona v. California*, 460 U.S. 605, 613-15 (1983) (permitting Indian tribe to intervene in original action involving water rights); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[I]t is not unusual to permit intervention of private parties in original actions."); *see also Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930) ("An individual citizen may be made a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted.").

When the Court exercises its original jurisdiction in a dispute involving water rights, the Court must "resolve[] interstate claims according to the equities." *Arizona v. California*, 373 U.S. 546, 562 (1963). This delicate balancing of interests does not lend itself to inflexible rules that may hinder the weighing of the many factors necessary to ensure a fair and equitable allocation. *See Idaho ex rel. Evans*

v. Oregon, 462 U.S. 1017, 1026 n.10 (1983) ("Flexibility is the linchpin in equitable apportionment cases . . . ."). Nevertheless, South Carolina proposes an inflexible rule that would preclude a Special Master from hearing from intervenors whose presence would aid the weighing of those equities.

The rule advocated by South Carolina cannot be reconciled with this Court's express holding that local governments may participate in an original action when named as a defendant.[1] In *New Jersey v. New York*, 345 U.S. 369, 375 (1953), this Court expressly recognized that the City of New York could participate as a defendant in an equitable apportionment action brought pursuant to this Court's original jurisdiction when that city stands as "the authorized agent for the execution of the sovereign policy which threatened injury" to the complaining State.

South Carolina asserts that this Court's decision in *New Jersey v. New York* is distinguishable because the City of New York was named as a defendant against its will, and a plaintiff should be the master of his own complaint. S.C. Br., p. 31. South Carolina correctly notes that in actions filed in federal district court, a plaintiff is generally

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[1] The analysis of the intervention motions, of course, would be completely different if the intervenors were seeking to assert claims for relief as a plaintiff. *See* S.C. Br., p. 18 n.11. Here, the intervenors are not asserting any affirmative claim for relief.

master of his own complaint. 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 107.14(2)(c)(v), at 107-67 (3d ed. 2006) (under federal rules of civil procedure, "the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue"); *see Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) (citing general rule in context of action filed in district court and governed by federal rules of civil procedure). In an original action, however, this general rule must give way to the Court's traditional "gatekeeping function" and the Court's desire to closely manage its original docket. *See Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995).

Under South Carolina's reading of *New Jersey v. New York*, the City of Charlotte could be made a defendant if it had been included in the caption of South Carolina's Bill of Complaint, but because Charlotte was not so named, it may not be joined as an intervenor. That position defies logic. This Court, rather than South Carolina, must determine who should stand as defendants in this action, irrespective of whether South Carolina has carefully crafted its Bill of Complaint in an effort to avoid naming as defendants the instrumentalities of its purported harm.

If South Carolina were correct that this Court's precedents create a blanket rule against intervention in water rights cases, there would have been no need for the Court to refer the intervention motions to the Special Master. In addition to the briefing before this Court, the States and intervenors have submitted numerous briefs and

have engaged in several oral arguments before the Special Master with respect to the motions at issue. Under South Carolina's theory, that effort was completely unnecessary because the Special Master should have summarily denied those motions. The Court's decision to refer this issue to the Special Master, however, reflects that the resolution of the motions requires a careful balancing analysis and is not governed by an inflexible rule that would automatically preclude intervention. If such balancing of interests were not necessary, the Court could have issued a one sentence order disposing of the motions and saving the Special Master, the States and the intervenors unnecessary expenditures, time and effort.

The blanket rule that South Carolina advocates would also undermine the very role that Special Masters play in original actions. The Special Master is in the best position to determine whether the presence of intervenors will benefit the resolution of the case and the extent to which the intervenors' involvement should be limited. Having engaged in numerous hearings and status conferences in which the intervenors participated, the Special Master understands fully the dynamics of this dispute and whether the presence of the intervenors would assist in its prompt resolution. The motions to intervene are first and foremost a case management issue – a determination that the Special Master is in the best position to make given her unique perspective. Here, the Special Master believes the presence of the intervenors to be an asset, rather than a detriment. This Court should accept the considered and well-

reasoned recommendation of the Special Master as to how to best move this case forward.

II. SOUTH CAROLINA'S CONCERN OVER THE POSSIBILITY OF WIDE-SCALE INTERVENTION IS MISPLACED.

South Carolina asserts that the Special Master's recommendation, if adopted by this Court, would result in wide-scale intervention in other original actions. S.C. Br., p.15 (arguing that the Special Master has "open[ed] the door to widespread intervention in original actions generally"); *see also* U.S. Br., p. 21 (Special Master's recommendation "raises the specter of wide-scale intervention by individual water users"). Such a concern is unfounded.

The Special Master concluded that each of the three intervenors has a direct, compelling and concrete interest in the present dispute. Interim Report, pp. 25, 27-28, 32. The Special Master correctly observed that the number of similarly situated parties is extremely small. *See id.* at 25. In fact, there are a total of four – only three of whom have moved to intervene. The Bill of Complaint focuses on three interbasin transfers (the City of Charlotte, Concord/Kannapolis and CRWSP/Union County) and the utility that controls the flow of the Catawba River through the operation of its federally permitted system of dams and reservoirs. The Special Master recognized that the presence of Duke Energy, Charlotte and CRWSP would not make the litigation unmanageable nor would the granting of the motions result in widespread requests by others.

Only one other interbasin transfer (Concord/Kannapolis) is mentioned in the Bill of Complaint.[2]

The granting of the present motions would not result in a rash of intervention motions in other cases. The Special Master's lengthy report focuses on the unique facts of each intervenor and the nature of South Carolina's specific challenge to each intervenor's rights and interests. As the Special Master recognized, Charlotte and CRWSP have been specifically attacked by South Carolina as the "agent or instrumentality of the harm" of which South Carolina complains. Interim Report, p. 15. South Carolina's Bill of Complaint explicitly seeks relief against both. *See id.* at 22-23, 27-28. The Special Master also recognized that Duke Energy has unique rights and interests in this action as a result of its control of the dams on this river system. *Id.* at 28-29.

As set forth above, the Special Master properly considered the unique circumstances of the dispute and the practicalities of managing the litigation before her. Given the fact-specific nature of her recommendation, there is simply no risk that by

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[2] Given the passage of almost two years since South Carolina moved to file a Bill of Complaint, any motion by Concord/Kannapolis at this late stage undoubtedly would be denied. The few additional North Carolina municipalities with "grandfathered" IBTs that, arguably, could have sought to intervene would likewise be precluded from doing so at this late date.

adopting that recommendation, this Court will spawn a plethora of intervention motions in other cases.

III. THE UNITED STATES ERRS IN ASSERTING THAT THE PRESENCE OF INTERVENORS WOULD MAKE SETTLEMENT MORE DIFFICULT.

In its amicus brief, the United States argues that the motion to intervene should be denied because the presence of the intervenors will make settlement more difficult.[3] U.S. Br., pp. 8, 21-22. Specifically, the United States asserts that any expansion of the number of parties would make it less likely that the case could be settled. *Id.* at 21. That argument, however, fails to consider fully the process by which States traditionally have settled water right disputes.

Should North Carolina and South Carolina successfully negotiate a settlement of the present dispute, such a resolution would likely need to be memorialized through a compact between the States. *See* S.C. Mot. for Leave to File Bill of Complaint, Ex. 2, at 8 (Letter of Dec. 19, 2006 from General

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[3] Other than its filing of an amicus brief, the United States has had no involvement in this proceeding. Accordingly, this Court should defer to the Special Master's assessment as to whether the presence of the intervenors would make settlement more difficult, rather than the assessment of the Acting Solicitor General.

McMaster to General Cooper) (noting that the "alternative to litigation" is to "negotiate an interstate compact"). An interstate compact, of course, requires that the terms of the compact be ratified by the legislatures of the party States. Additionally, the compact must be approved by Congress. U.S. CONST. ART. I, § 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."); *see also College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) ("Under the Compact Clause, U.S. Const., Art. I, § 10, cl. 3, States cannot form an interstate compact without first obtaining the express consent of Congress . . . ."); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943) (recognizing that settlements of equitable apportionment actions should be "pursuant to the compact clause of the federal Constitution"). Because a compact must be enacted by the state legislatures and Congress, all interested persons can petition their elected representatives with respect to any proposed settlement of the present dispute.

The brief of the United States leaves the incorrect impression that two States can reach a settlement agreement in confidence without having to consider the views of interested parties. That, however, is simply not the case. In fact, if interested parties are excluded from the process (as the United States advocates), they are more likely to derail any tentative agreement when that agreement must be voted on by the state legislatures and members of Congress.

The United States also fails to recognize that the involvement of the three specific intervenors (whose motions the United States opposes) is crucial in working toward any realistic settlement of this action. The amount of water released from the dams owned and operated by Duke Energy controls the flow of the river into South Carolina. In light of the role of Duke Energy in managing (and understanding) the flow of this river for over one hundred years, any attempt to exclude Duke Energy totally from the negotiation process would be extremely short-sighted. In fact, Duke Energy was the principal facilitator for bringing South Carolina, North Carolina and other interested parties together to negotiate and execute a Comprehensive Relicensing Agreement in connection with Duke Energy's new FERC license application for the Catawba-Wateree Hydro Project. Those negotiations, which appeared successful until the filing of this action by South Carolina, produced a negotiated settlement with respect to the rate of water flow into South Carolina from the Duke Energy reservoirs, as well as an agreement as to specific conservation measures that all water users are required to undertake during drought conditions.

Similarly, excluding the City of Charlotte and CRWSP from any negotiation efforts would likely doom those efforts to failure. In this action, South Carolina seeks to enjoin the interbasin transfers of both of those entities. Settlement is much more likely if the parties that are the focus of South Carolina's claims are included in settlement discussions. Moreover, if Charlotte and CRWSP were completely excluded from settlement

discussions, both States would likely have great difficulty in obtaining the necessary legislative support for a compact.

The Special Master wisely recognized that allowing these three intervenors to participate in this action, in a limited role, would aid in the resolution of this dispute, irrespective of whether this dispute is ultimately resolved by a decree from this Court or through a negotiated settlement.

IV. EACH OF THE THREE INTERVENORS HAS SUFFICIENT INTEREST TO JUSTIFY ITS PARTICIPATION IN THIS ACTION.

Each of the three intervenors has a compelling justification for being heard in this action. The Special Master properly considered the interests of the intervenors, the impact their presence might have on the party States and whether their presence would add to her ability to obtain and assimilate the information necessary for her to properly understand this unique water system. Prior to the rulings that South Carolina now challenges, the Special Master had the benefit of nine status conferences and one formal hearing (spanning a total of 668 transcript pages) in which the intervenors participated. Thus, the Special Master clearly understood the advantages and disadvantages of allowing the intervenors to participate and how their presence would affect the litigation. She concluded that the participation of these entities, in a limited role, would assist her in reaching the proper outcome in this case and that any potential downside to their

participation could be controlled and minimized. North Carolina respects and supports the Special Master's conclusion.

1. Duke Energy's request to intervene is well taken. Duke Energy built and has owned and operated the dam system that controls this river for over a hundred years. These dams are licensed by FERC. As the Special Master noted, "[b]oth Duke's existing . . . license and the agreed-to terms for its prospective FERC license set minimum flow requirements under various conditions, including times of drought." Interim Report, p. 29. But for the presence of these dams, the natural flow of the river would fluctuate so greatly that it would be quite difficult to have sustainable development in the Catawba River Basin in either State. Moreover, Duke Energy is the largest consumer of water from the Catawba River – water that is used to produce electricity for the benefit of residents of both States.

Despite Duke Energy's substantial interests in the Catawba River, South Carolina asserts that Duke Energy stands in the same class as all other persons who consume water from this river – a class of persons that is adequately represented by North Carolina as *parens patriae*. North Carolina vehemently disputes this contention and does not purport to represent the interests of Duke Energy in this litigation.

The relief that South Carolina requests, in addition to striking down North Carolina's IBT statute and the existing IBTs, is an allocation of a specific flow of water into the State of South

Carolina (which South Carolina apparently believes to be 711 million gallons per day). Bill of Compl. ¶ 14. When natural conditions do not support a flow at this level, sustaining such a flow into South Carolina could be achieved by either: 1) drawing down water from the reservoirs owned and operated by Duke Energy; 2) reducing North Carolina's intake from the river, or 3) some combination of both. Duke Energy's financial interests in preserving the stored energy capacity behind each of its dams stand in sharp contrast to North Carolina's interests in this action.

As the Special Master recognized, Duke Energy also has a compelling interest in ensuring that the Comprehensive Relicensing Agreement is not undermined by this litigation. In that agreement, Duke Energy, South Carolina, North Carolina, numerous local governments in both States, and various private entities agreed on flow parameters for the river, as well as conservation measures in times of drought. South Carolina's filing and prosecution of this action threatens to undermine the core environmental provisions of the agreement. Under these unique circumstances, Duke Energy should be permitted an opportunity to be heard.

Through its dams, Duke Energy controls the flow of this river and has a vital stake in maintaining its reservoirs in both States. That interest is not aligned with either South Carolina or North Carolina. Accordingly, Duke Energy should be permitted to intervene.

2. The interests of CRWSP have been expressly attacked by South Carolina in the Bill of Complaint. In this action, South Carolina seeks to enjoin CRWSP's current IBT. Accordingly, CRWSP has a substantial interest in being heard in this action.

CRWSP stands in an extremely difficult position as a result of this litigation. CRWSP is a joint venture consisting of a political subdivision of South Carolina (Lancaster County Water and Sewer District) and a political subdivision of North Carolina (Union County). If South Carolina were to succeed in enjoining the IBT on which CRWSP relies to serve its customers in Union County, the joint venture would undoubtedly unravel, thereby creating great hardship for residents in both States. Although North Carolina opposes South Carolina's request that all IBTs in North Carolina be enjoined, the State of North Carolina does not and cannot represent the financial interests of a political subdivision of the State of South Carolina. Thus, the interests of CRWSP are not and cannot adequately be represented by either State. CRWSP's motion to intervene should therefore be allowed.

3. Charlotte's IBT dwarfs all other transfers of water in North Carolina from the Catawba River. This IBT is specifically attacked in the Bill of Complaint, and South Carolina requests that North Carolina be enjoined from allowing Charlotte to continue its transfers of water from the Catawba River. Thus, South Carolina's Bill of Complaint effectively paints a bulls-eye on the City of Charlotte. As a result, Charlotte has a substantial

and compelling interest in requesting leave to intervene.

Before the Special Master, Charlotte asserted that its interest were not adequately represented by the State of North Carolina. The State of North Carolina disagrees with this assertion by Charlotte. Nevertheless, North Carolina does not believe that this factor is, or should be, determinative here. Charlotte transfers more water from the Catawba River than all other North Carolina transfers from the Catawba combined. Moreover, after Duke Energy, it is the largest consumer of water from the Catawba River in either North Carolina or South Carolina. As a result, its role with respect to this river is unique and has caused it to be singled out by South Carolina. Charlotte's involvement in this dispute is precisely analogous to the role of the City of New York in *New Jersey v. New York*, 345 U.S. 369 (1953). As in *New Jersey v. New York*, Charlotte is "the authorized agent for the execution of the sovereign policy which threatened injury" to the complaining State. *Id.* at 375. Just as the City of New York was permitted to participate as a defendant in that original action, Charlotte should be permitted to participate as a defendant here. The fact that South Carolina chose not to name Charlotte as a defendant should not be controlling.

In *New Jersey v. New York*, the Court denied the motion to intervene filed by the City of Philadelphia – a motion that was filed over two decades after the original action had been commenced. This Court recognized that the presence of Philadelphia at such a late stage would

add little given the fact that the State of Pennsylvania had been represented throughout the proceeding. In doing so, the Court noted that under the doctrine of *parens patriae*, a State is deemed to represent its citizens for otherwise "a state might be judicially impeached on matters of policy by its own subjects." 345 U.S. at 373. This statement, however, must be read in the context of the procedural posture of that case. South Carolina is mistaken in reading this sentence to mean that when a State is made a party to an original action, its subjects cannot also be made parties. If this were the case, the Court would not have allowed the City of New York to participate as a defendant given the presence of the State of New York in that action. Here, Charlotte's unique status makes it more comparable to New York than to Philadelphia. This is particularly true given that North Carolina is not concerned that it will be judicially impeached by Charlotte's positions in this action.[4]

In light of South Carolina's specific attack on Charlotte in the Bill of Complaint, North Carolina agrees with the Special Master's recommendation that Charlotte be allowed to intervene.

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[4] In *New Jersey v. New York*, the State of Pennsylvania opposed intervention by the City of Philadelphia. 345 U.S. at 372. Here, North Carolina concurs with the Special Master's recommendation to allow Charlotte to intervene.

V. THE PRESENCE OF THE INTERVENORS WILL NOT PREJUDICE THE PARTIES.

The Special Master concluded that the presence of the intervenors will not prejudice either North Carolina or South Carolina. *See, e.g.*, Interim Report, p. 42. In South Carolina's lengthy brief in support of her exceptions, South Carolina fails to point to a single, concrete example of prejudice that will be suffered by either State.

The Special Master has taken an active, hands-on approach to managing this original action. She has instituted a practice of conducting detailed monthly telephonic conferences to ensure that the case is progressing. Those conferences frequently address the specifics of all pending discovery. Additionally, the parties have been directed to submit written status reports to the Special Master on a monthly basis. Given the tremendous efficiencies that the Special Master has imposed to date in this action, North Carolina is confident that the Special Master will not allow the presence of the intervenors to negatively impact the progress or costs of this proceeding.

CONCLUSION

The plaintiff's exceptions to the Special Master's First Interim Report should be denied.

Respectfully submitted,

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March 9, 2009

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